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No.

In the
SUPREME COURT OF THE UNITED STATES

October Term, 2001

Baltia Air Lines, Inc.
(shareholders, employees and creditors), Petitioner
v.
Canadian Imperial Bank of Commerce, and
CIBC Oppenheimer Corp, Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 17A(b)(6) of the Securities Exchange Act provides that "[n]o registered clearing agency shall prohibit or limit access by any person to services offered by any participant therein." 15 USC§78q-1. A broker/dealer who contracts to use a clearing agency to process trades is a participant therein. A clearing agency may limit a participant's access only if due process procedures of §17A(B)(5) are followed. The public has no direct contact with the clearing agency and has access to clearing services through a participant who is usually a licensed broker/dealer. Section 29(b) of the Act voids any contract or practice that violates any provision therein. 15 USC 78cc.

1. Does conduct directly violating §17A(b)(6) give rise to any private cause of action or create a legal relationship between a clearing agency and a person who was offered clearing service by a participant therein, whereby the clearing agency has a duty to disclose the risk that access to clearance might be denied him, at will?

2. When a clearing agency relies upon a contract right to selectively deny access in violation of §17A(b)(6), does the protected person have standing to use §29(b) in challenging the legality of that contract?

PARTIES TO THE PROCEEDINGS

Petitioner

Baltia Air Lines, Inc., a U.S. start up airline.

Respondent

Canadian Imperial Bank of Commerce, a foreign corporation doing business relevant to this case as CIBC Oppenheimer Corp., CIBC World Markets, CIBC Wood Gundy Securities, Inc., CIBC Aerogold Visa, CIBC AeroCorporate Visa, CIBC AeroMortgage, and Aeroplan Frequent Flyer Program.

Co-Respondent

CIBC Oppenheimer Corp is the U.S. Private Client Division of CIBC World Markets, the global marketing name of the investment banking and securities businesses of the Canadian Imperial Bank of Commerce (CIBC)[1]. CIBC Oppenheimer, formerly Oppenheimer & Co., Inc., does business as a licensed broker/dealer and also as a registered clearing agency. This suit names CIBC Oppenheimer Corp solely in its capacity as CIBC's registered clearing agency.

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[1]CIBC Oppenheimer Company Profile, Record, Ex. 17, p.7; A-262.

registered clearing agency.

STATEMENT PURSUANT TO RULE 29.6

Petitioner Baltia Air Lines, Inc. states that it has no corporate parents, and that no publicly held company owns 10% or more of the Baltia Air Lines's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The appellate court's summary order affirming the district court's dismissal is unreported and is reproduced at 1a. The opinion and order of the district court is unreported and is reproduced at 6a. The New York Court of Appeals order denying leave to appeal is unpublished and is reproduced in at 8a. The New York Supreme Court, Appellate Division order denying leave to reargue and other relief is unpublished and is reproduced at 11a. The New York Supreme Court, Appellate Division, First Department Opinion affirming dismissal is published at 273 A.D. 2d 55; 709 N.Y.S. 2d 54 (2000) and is reproduced at 12a. The New York Supreme Court, First Division opinion and order is the transcript and unpublished.

JURISDICTION

The opinion of the United States Court of Appeals for the Second Circuit entered its opinion and order on April 25, 2001. Justice Ginsburg subsequently extended the time to file this petition for a writ of certiorari to and including October 29, 2001. Petitioners invoke this Court's jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The Securities Exchange Act of 1934, as amended, 15 U.S.C. §§78a, *et seq.*

§3(23)(A) The term "clearing agency' means any person who acts as an intermediary in making payments or deliveries or both in connection with transactions in securities . . . .

(B) The term "clearing agency' does not include . . . (iii) any bank, broker, dealer. . . solely by reason of functions performed by such institutions . . . as customary banking, brokerage, dealing . . . activities, or solely by reason of acting on behalf of a clearing agency. . . .

§ 11A(a)(2) . . . The Commission, by rule, shall designate the securities or classes of securities qualified for trading in the national market system. . . .

§17A(a)(1) The Congress finds that . . . (D) The linking of all clearance and settlement facilities and the development of uniform standards and procedures for clearance and settlement will reduce unnecessary costs and increase the protection of investors and persons facilitating transactions by and acting on behalf of investors.

§17A(b)(5) In any proceeding by a registered clearing agency to determine whether a person shall be denied participation or prohibited or limited with respect to access to services offered by the clearing agency, the clearing agency shall notify such person of, and give him an opportunity to be heard upon the specific grounds for denial or prohibition or limitation under consideration and keep a record. A determination by the clearing agency to deny participation or prohibit or limit a person with respect to access to services offered by the clearing agency shall be supported by a statement setting forth the grounds on which the denial or prohibition or limitation is based.

§17A(b)(6) No registered clearing agency shall prohibit or limit access by any person to services offered by any participant therein.

§29(b) Every . . . contract . . . made the

> performance of which involves the violation of . . .any provision of this title . . . shall be void (1) as regards the rights of any person who, in violation of any such provision. . . shall have . . . engaged in the performance of any such contract. . . .

STATEMENT OF THE CASE

Respondent, a foreign entity, used its wholly-owned U.S. clearing agency to abort the sale of Petitioner's stock. Without cash from the sale to meet the regulatory working capital requirement, Petitioner could not commence flight operations destined were forecast to divert traffic from the airlines in which Respondent had significant financial interests. Petitioner is a U.S. start up airline that had exclusive U.S. rights to carry passengers, freight and mail nonstop direct between New York and St. Petersburg, Russia, the fourth largest city in Europe. All traffic between those two major cities was, and is, carried by foreign carriers or a combination of foreign and U.S. carriers that make one or more intermediate stops. Petitioner had been granted these rights following a year's proceedings before the U.S. Department of Transportation involving 12 competing U.S. airlines.

The U.S. government selected Petitioner's proposal because it was superior, furthered national aviation policy and was sustainable. To summarize relevant parts of the order: Petitioner proposed five weekly nonstop direct flights between New York and St. Petersburg. The choice of this new carrier increased competition in

international aviation and provided an opportunity for new investors willing to risk such an investment. Foreseeable market share of the traffic made Baltia's proposal sustainable. It was reasonable that Baltia, being the exclusive nonstop carrier, would divert significant traffic from foreign carriers serving between New York and St. Petersburg[2].

Commencement of operations was conditional upon having working capital equal to 1/4 annual expenses assuming zero revenue which Petitioner planned to raise through the sale of stock. Respondent, through its airline division, had knowledge of the route award and financial condition.

In June 1998 Petitioner sold, and a dealer purchased, stock on condition that it be registered and with payment due after the registration effective date at closing. The dealer was a participant in Respondent's clearing agency, offered Respondent's services for closing, and delivered Respondent's document which is the public disclosure of its confidential contract with the dealer and with all of its other participants. The document's language concealed the risk that Respondent might arbitrarily refuse access to clearance at will and without notice.

On February 1, 1999, and anticipating a February 5th closing, Respondent declared it would clear no transaction involving Baltia stock. By February 1, 1999, the dealer had placed the sale of all Petitioner's stock, a

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[2] U.S. Department of Transportation Order 91-6-2

registration effective date was set for February 5, 1999, stock was listed on The Nasdaq SmallCap Market, the Boston Stock Exchange, and Standard & Poor's. Thirteen states had approved the stock for sale. Petitioner had made down payments on two Boeing 747 aircraft, principal employees were in place, and all services contracts required by the FAA for initiating flights were signed.

Petitioner did not know what could prevent access to clearance. Respondent asserted it had no obligation to provide anything and refused written notice or rationale. During the window of time before closing had to occur, Petitioner tried unsuccessfully to identify the problem or find alternate financing. When time expired, Petitioner sued to compel access to clearance, and if denied, for damages for fraud.

Petitioner sued on the confidential contract for clearance that had been outlined Respondent's public disclosure statement and on Respondent's omitting from that document any indication that access might be denied, and at will. Respondent claimed the confidential contract gave it an absolute right to refuse services and it had no duty to disclose anything to Petitioner. Petitioner responded that Respondent had a duty specific to access and the contract was illegal. Further, the contract language reserving to Respondent a right to deny access was different in form from the rest of the document and had obviously been inserted. When read in context, the language only reserves to Respondent such rights as the Act permits. Respondent filed a letter from the New York Stock Exchange (NYSE) approving its participation

contracts as evidence of contract legality.

Thereafter, Petitioner subpoenaed several confidential participation contracts from the New York Stock Exchange ("NYSE") and spoke with its General Counsel denied that NYSE reviewed any participation contract for legality. Most of the subpoenaed-contracts contained language declaring a right to selectively refuse access to selected trades. During that time and responding to an inquiry about this case in an interview published internationally, Respondent's General Counsel advised all clearing agencies to "Make sure that the contract provides the clearing firm the right to refuse IPOs [Initial Public Offerings]."[3]

Petitioner consulted Mr. Melvin Weiss of Milburg, Weiss, Bernshard, Hynes and Lerach, and following his direction, reported Respondent's violation of §17A(b)(6) to the SEC.[4] Petitioner continued supplying the SEC with information as it was discovered. Petitioner was advised the following: SEC planned to take no action. No court had previously reviewed 17A(b)(6) and the SEC had specific jurisdiction[5] as well as limited resources. Even if it had the authority and brought an investigation, the SEC has no remedy for damages to the public

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[3]Record, Exhibit 29, p.2; A-287.

[4]Petitioner makes this proffer to be supported by correspondence at trial.

[5]Inferred was the SEC belief that it may not have jurisdiction to pursue an individual's right under 17A(b)(6).

person. Actions for damages are usually brought under §10(b) for fraud.[6]

Concurrently, Petitioner discovered that, excepting British Airways and Aeroflot, Respondent has financial interests in every airline that serves St. Petersburg, Russia with connections to New York through foreign countries. Each is required by treaty to make at lease one intermediate stop. The U.S. government had forewarned that those carriers would lose significant market share to Petitioner's nonstop direct service. Petitioner had anticipated strong competition but was unprepared for competition in the form of self-interested clearing agency interference with its underwriter.

The state court found that Respondent indeed had the contract right to deny Petitioner's access to capital, did not have a duty to disclose this contract right prior to its exercise, and dismissed Petitioner's suit.[7] Believing that the significant securities violations were now involved, Petitioner filed in federal courts which found no cognizable cause of action.

Without the requisite working capital from the sale of its stock, Petitioner was unable to commence flight operations, lost its U.S. government route authority for

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[6]15 USC 78j.

[7]The state appellate court denied Petitioner's petition to appeal. Petitioner, lacking funds, abandoned any challenge of the state appellate court's decision in the interest of pursuing the federal complaint.

dormancy, had no revenue with which to make payments on its aircraft, had to let employees go, and closed its office at JFK Airport.

Respondent continuously cleared all other trades the broker/dealer presented until he established participation in another clearing agency in December 1999.

The Securities Exchange Act of 1934

The Securities Exchange Act of 1934 was amended in 1975 to create a system of self-regulatory organizations. ("Act"). The self-regulatory organizations are Exchanges, Clearing Agencies and Securities Associations. Each is organized to comply with the Act. and to enforce compliance by its members with the rules of its organization. Section 17A of the Act was enacted in 1975 to establish the National System for Clearance and Settlement of Securities Transactions. The SEC was tasked with using its authority to assure equal regulation of clearing agencies therein. The SEC is to have due regard for the protection of investors in facilitating the establishment of the clearing system, its links and standards. The SEC is not tasked with enforcing the rights of the investor.[8]

Sections 17A(a) and (b) of the Act are relevant to

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[8]Congressional finding, Exchange Act §17A(a)(1); 15 USC 78q-1(a).

this case. In subsection 17A(a), Congress is concerned with the protection of investors and persons acting on their behalf who are principally broker/dealers. Congress finds that linked clearance facilities and uniform standards and procedures for clearance increase that protection.

Subsection 17A(b) links the clearance facilities and establishes standards. Clearance facilities,[9] linked by participation contracts, include clearing agencies and their users. Any person who uses a clearing agency to clear securities transactions is termed a "participant," but the term does not include a person whose only use of a clearing agency is through another person who is a participant.

The standards and procedures established in §17A(b) provide fair competition, due process and protection for the investor. Example: Clearing agencies are permitted to limit a participant's use of services but only for statutory reasons or for failure to comply with agency rules[10] and only by complying with the due process procedure of §17A(b)(5). By contrast, an

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[9]"Facility" is only defined in the Act with respect to exchanges. Congress refers to clearance facilities as distinguished from its reference to clearing agencies. One infers from the parallel structure of Exchanges and Clearing Agencies that the term "facility" with reference to Clearing Agencies would be parallel to that term with reference to Exchanges.

[10]See §17A(b)(4)(B). 15 USC 78q-1(b).

absolute prohibition to limit access is established in §17A(b)(6). No clearing agency shall prohibit or limit access by any person who was offered those services by a participant therein.

The Proceedings Below

The appellate court affirmed the district court's judgment that there was no cognizable cause of action against Respondents, either for violation of §17A(b)(6) or for concealment of its "contract right" to arbitrarily refuse clearing access and do so without notice. The court found that the Respondent's clearing agent exercised a valid contractual right in refusing to serve as the clearing agency for the public purchase of Petitioner's registered securities. The court held that Respondent had no duty to disclose, in its public disclosure of its clearing relationship with participants, the material securities risk that Respondent intended, at will, to arbitrary refuse access to clearance.

The court also held: 1) §17A(b)(6) does not provide a private right of action; 2) Predicate acts were not alleged to support a RICO claim; 3) Petitioner lacked standing to bring a §10(b) action; 4) Petitioner was collaterally estopped from asserting fraud and it's state law claims.

The court misapplied *Cort v. Ash*, 422 U.S. 66 (1975), did not consider Petitioner's illegality defense or apply §29(b) which voids any practice that violates the Act, and cited no language in the contract that would grant Respondents a right that would supersede

§17A(b)(6) in the federally preempted area of interstate securities transactions.

REASONS FOR GRANTING THE WRIT

I. A CASE OF FIRST IMPRESSION, THE APPELLATE COURT'S DECISION LEAVES UNCERTAINTY IN THE FIELD OF SECURITIES CLEARANCE, DENIES THE IMPORTANT PROTECTION OF A STATUTORY PROHIBITION AGAINST RESTRAINT OF TRADE BY CLEARING AGENCIES , CONFUSING THE INTENT AND MEANING OF STATUTE (§17A), AND PREVENTING AN INJURED PARTY ANY EFFECTIVE RECOURSE OR PROTECTION

No court has reviewed the rights devolving from subsection (6) to §17A(b) of the Act, although courts have reviewed other subsections. Section17A(b)(6) is distinctly different from the rest of §17A in that it is the only subsection that protects a person who is neither licensed by the SEC nor within the self-regulatory organizations that comprise the national securities exchange. By holding that Respondent's conduct that violates §17A(b)(6) of the Act gives rise to no cause of action, the appellate court denies an investor use the courts when damaged by a violation of that section. The investor is left with *post facto* remedies the SEC or self-regulating association may determine, none of which can restore a legitimate victim from grievous harm.

The decision below significantly hinders the administration of the Act. The SEC is not equipped to

handle individual violations of §17A(b)(6) and is not sure it has jurisdiction to do so. Even if it had the authority and chose to use its resources to pursue a violation of §17A(b)(6), the SEC has no remedy for the damaged public person and the New York Stock Exchange ("NYSE") does not review its members' participation contracts for legality.

The appellate court's decision weakened the mechanism for prompt clearance. To ensure prompt clearance Congress had provided a system for pre-qualifying users of the clearing agency, termed "participants,"[11] and gave the public access to clearance through them.[12] Congress also added the element of certainty upon which both the participants and their clients could depend.

In §17A(b)(5) Congress required that in any proceeding by a clearing agency to determine whether a person shall be limited with respect to access to services offered by the clearing agency, that clearing agency must gives notice and an opportunity to be heard on the specific grounds for limitation under consideration and keep a record. If a decision were reached to limit access, it must be supported by a statement setting forth the specific grounds on which the denial or prohibition or limitation is based.

In §17A(b)(6) Congress provided certainty to the

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[11] §17A(b)(1)through(5); 15 USC 78q-1(b)

[12] §17A(b)(6); 15 USC 78q-1(b)(6)

investor who relied upon the services of a broker/dealer who was linked with a clearing agency. The investor was assured that his transaction would have access to clearance[13] for consummation.

The decision below affirmed a clearing agency's practice of limiting a participants access on an ad hoc basis and without complying with §17A(b)(5). It affirmed a practice that voided the guaranteed access provided by §17A(b)(6). Respondent asserts that it has the right to even refuse access after previously having approved the trade. Affirming such a practice defeats the certainty created by Congress to facilitate prompt clearance.

The linking of clearance facilities and the development of standards within the national system for clearance were to protect the public investor.[14] Participation contracts are the means of linking. If upheld, the decision below converts linking into anti-competitive power and eliminates standards.

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[13]Congress assures "access" to clearance, not guaranteed clearance. The clearing agency is not compelled by §17A(b)(6) to contribute to fraud or be forced to clear where error exists or procedures were not followed. A comparable situation exists in the banking industry. A person has access to check clearance, but if there are insufficient funds, known fraud, or errors, the check will not clear.

[14]15 USC 78q-1(a)

II. A SHIFT OF POWER TO CLEARING AGENCIES WILL HAVE WIDE DETRIMENTAL IMPACT ON THE PUBLIC SECURITIES SYSTEM, PLACING THE POWER TO RESTRICT THE FLOW OF CAPITAL IN THE HANDS OF ORGANIZATIONS WHO MAY ACT AGAINST U.S. PUBLIC POLICY, WITHOUT EFFECTIVE REGULATION OF ANTI-COMPETITIVE CONDUCT, AND DENYING INVESTORS LEGITIMATE AND BENEFICIAL INVESTMENT OPPORTUNITIES.

The appellate court's decision shifted power from the investor to the clearing agency. Every person in this nation who buys or sells securities through a licensed broker/dealer is a potential victim of a clearing agency's abuse of that power. The SEC has no remedy nor does the NYSE and the broker/dealer provides none. Under the appellate court's decision, there is no remedy available in the courts. The public has no recourse and the power of clearing agencies appears to be increasing.

Securities trades transacted by mail or interstate commerce must be cleared through a registered clearing agency[15] and there are only a handful[16] in the nation.

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[15] §17A(b)(1)

[16] "Handful" is the quantity identified by Respondent's attorneys. Originally 12 clearing agencies were registered by the SEC. Today, the industry is dominated by the following 6 clearing agencies: Pershing, Bear Sterns, National Financial, U.S. Clearing, CIBC Oppenheimer and Merrill

Language, comparable to that sanctioned by the court, appears in the confidential contracts several clearing agencies have with their participants. Respondent advocates hat, to protect themselves against a suit for refusing access to a public person, all clearing agencies should include in their contracts with participants a right to arbitrarily refuse clearing services.[17] The industry press apparently reflects the expanding role of the clearing agency to "overseeing an offering." Currently and with little liability, clearing agencies assert language in confidential contracts to justify aborting, at will, any individual trades brought by a participating broker/dealer.

The participating broker/dealer has little power with which to protect its client. To remain in business, the broker/dealer is dependent upon maintaining an amiable relationship with its clearing agency. Respondent's boiler-plate participation agreement requires exclusivity and contains an arbitration clause. The participant agrees to give several months notice of termination while Respondent, who drafted and interprets its own contract, effectively terminates at will.

A broker/dealer cannot timely protect its client by presenting the transaction to an alternate clearing agency, by filing an arbitration claim against the clearing agency, or by joining the client in a suit. Section

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Lynch. Numerous small clearing agencies also exist but are insubstantial players in the market.

[17]Record, Exhibit 29, p.2.; A-287

17A(b)(3)(a) of the Act places the responsibility for enforcing participant compliance upon the clearing agency. Reasonably then, the clearing agency requires due diligence before contracting with a new participant. In the instant case, it took ten months for Petitioner's broker/dealer to establish participation in a subsequent clearing agency without interrupting business. Thereafter he dared file an NASD arbitration claim against Respondent, his former exclusive clearing agency. Today, more than a year after the claim was filed, there has not yet been a hearing. A broker/dealer cannot afford to join a client in a §17A(b)(6) suit for fear the clearance of his trades would be jeopardized. If the broker/dealer chose to participate in a different clearing agency, the other five dominant clearing agencies might find the suit cause to reject his application.

Petitioner's broker/dealer had no prior knowledge of Respondent's alleged contract right to arbitrarily refuse access to clearance, at will. Respondent's contract interpretation was based upon language that had been inserted in the confidential contract but omitted from the public disclosure of that contract. The disclosure statement assures the public of access to clearance. Further, the interpretation is inconsistent with the contract's opening paragraph declaring that Respondent will provide clearing service subject to terms and conditions of the securities laws. Finally, it is unreasonable to expect the broker/dealer to have anticipated that a clearing agency would directly violate a Federal statute.

A suit against the brokerage firm provides no legal

recourse. Such a suit would be neither ethically reasonable nor legally feasible. In the instant case, Petitioner believed it ethically reprehensible to sue the broker/dealer who had diligently worked for nine months, completed all aspects of the trade and lost a million dollars when Respondent refused access to anyone purchasing Petitioner's stock.[18] It was also a legal impossibility for Petitioner's broker/dealer to timely consummate the purchase.

The appellate court affirmed power shift that enables the clearing agency to arbitrarily control capital flow. Controlling or influencing the flow of capital can be used to implement or defeat federal policy. We see examples of implementing policy through tax incentives and in federal matching of state funds. The clearing agency's power to arbitrarily restrict capital can interfere with federal supremacy and policy.

Congress has unquestionably asserted federal preemption over interstate public securities transactions. Congress specifically provided that "[t]he Commission, by rule, shall designate the securities or classes of securities qualified for trading in the national market system[19]. Currently, clearing agencies can assert a contract right to unilaterally determine on an *ad hoc* basis

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[18]In the development of products liability cases, the law moved from requiring a suit against the innocent retail merchant to permitting suit directly against the negligent producer in appropriate cases.

[19]15 USC 78K-1(a)(2).

which of certain securities will, in fact, qualify to be traded. The federal government has dual interests in setting the standards for approving a security for sales to the public. The standard must be high enough to protect the public investor and not so high that it denies the public the benefits from, and an opportunity to invest in, an endeavor. When securities meet the standard, they qualify and are registered for public offering.

By granting judicial sanction to Respondent's conduct, the appellate court invaded the Commission's exclusive power to determine what securities qualify for trading. The decision gave the clearing agency the right to second guess the Commission and, in fact, arbitrarily make a self-determination on an *ad hoc* basis. The power to determine which stock will be traded can be abused for personal benefit at the expense of society's, as occurred in the instant case regarding international air service.

Interference with fulfillment of federal policy is a national concern and this case is an example of how the judicial sanction below granted a foreign bank power to trump a U.S. government decision and reverse policy. It is federal policy to utilize a scarce national resource to derive the greatest national benefit. The right to carry passengers and freight between the U.S. and a foreign country is a scarce national resource bargained for by the U.S. Department of State. The U.S. Department of Transportation ("DOT") expended resources for more than a year to select the airline proposal that would provide the greatest benefit to the U.S. traveling and shipping public.

The U.S. government selected Baltia's proposal because it was superior, furthered national aviation policy, and was sustainable. No other U.S. carrier proposed nonstop direct flights between New York and St. Petersburg.[20] The choice of a new carrier increased competition in international aviation. It provided a new opportunity for investors willing to assume the risk. Foreseeable market share of the traffic made Baltia's proposal sustainable.

The DOT held it reasonable that Baltia, being the exclusive nonstop carrier, would divert significant traffic from foreign carriers serving between New York and St. Petersburg.[21] By 1999, Respondent had financial interests in virtually every air carrier serving St. Petersburg with traffic from the New York market.[22]

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[20]It is known and accepted in route proceedings before the U.S. Department of Transportation that the first city on a multi-stop flight reaps the greatest economic benefit.

[21]U.S. Department of Transportation Order 91-6-2, p16 states: "Baltia would be the only carrier providing nonstop service from New York. It is, therefore, reasonable to anticipate that Baltia would divert a significant amount of traffic from the sixth freedom foreign carriers, as well as from Aeroflot and [then] Pan Am, which are currently providing only connecting one-stop or two-stop service.

[22] Excepting British Airways and Aeroflot, all are part of the Star Alliance developed with Respondent and in which Respondent has millions of dollars invested and loaned. "Marketing and code-sharing alliances and frequent-flier

Respondent, a foreign bank, used its wholly-owed U.S. clearing agency to stop Baltia from commencing operations and to prevent its diverting traffic that was then a revenue stream for Respondent.

As a result of the courts' decisions that Petitioner had no cause of action, the U.S. has lost value in its natural resource, *i.e.* the right to authorize nonstop direct flights into St. Petersburg. Today international aviation competition has not increased and U.S. passengers and shippers have no direct flights to St. Petersburg, Russia, the fourth largest city in Europe. More than 130 New York connecting flights arrive in St. Petersburg weekly through foreign cities that gain the greatest economic benefit. Had Petitioner been able to enforce §17A(b)(6), the economic gain from nonstop direct service could be benefitting the U.S..

As a result of the appellate court's affirmation of Respondent's arbitrary control over the flow of capital, the DOT policy of increasing options available to the traveling, shipping and investing public, as well as

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programs have been surrogates for classical mergers. I think this is the final consolidation phase of the airline industry. . . . Obviously the smaller carriers have objected to the fact that they've been abused by the larger companies. This will further strengthen their arguments." Respondent's Managing Director, CIBC World Markets and CIBC airline analyst. "But it doesn't mean lower fares. . . . To lower fares, you have to increase supply and alliance don't increase supply." Samuel Buttrick, airline analyst for Paine Webber. Record, Exhibit 36.

increasing competition in international aviation, were reversed.

The appellate court's decision weakened the national faith in, and reliance upon, the federal government's provisions for protection. The court failed to apply §29(b) and the U.S. Supreme Court decision in *Kaiser v. Mullins*, 455 U.S.72 (1982) which together void Respondent's contract and practice denying Petitioner access to clearance, the protection provided in §17A(b)(6).

Section 29(b) provides that every contract made in violation of any provision of the Act or the continuance of any relationship or practice in violation of any provision of the Act shall be void as against any person who made or engaged in the performance of the contract and *Kaiser* grants Petitioner standing to raise the defense.

The court in *Kaiser v. Mullins*, 455 U.S.72 (1982) stated:

> With respect to a statute which also provides that contracts which violate it are void, at the very least, Congress must have assumed that the statute could be raised defensively in private litigation to preclude the enforcement of a contract. Therefore, where a . . . defense is raised by a party which [the statutory section] was designed to protect and where the defense is not directed to a collateral matter but to the portion of the contract for which

> enforcement is sought, a court must entertain the defense.

Applying the holding in *Kaiser*, a court would be required to entertain Petitioner's defense. The appellate court did not do so, and enforced the contract against Petitioner.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Baltia Air Lines, Inc., Plaintiff-Appellant-Cross-Appellee, v. CIBC Oppenheimer Corp., and Canadian Imperial Bank of Commerce, Defendants-Appellees-Cross-Appellants.

Nos. 00-7867, 00-7883 (XAP)

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

2001 U.S. App. LEXIS 7814; *Fed. Sec. L. Rep. (CCH) P91,421*

April 25, 2001, Decided

NOTICE:

RULES OF THE SECOND CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY:
Appeal from the United States District Court for the Southern District of New York, (Alvin K. Hellerstein, Judge).

DISPOSITION:
AFFIRMED in part, and VACATED and REMANDED in part.

COUNSEL:
APPEARING FOR APPELLANT: Steffanie Lewis, The International Business Law Firm PC, Arlington, VA.

APPEARING FOR APPELLEES: Howard Godnick, Schulte Roth & Zabel, LLP, New York, New York.

JUDGES:
PRESENT: HONORABLE Joseph M. McLaughlin, HONORABLE Fred I. Parker, HONORABLE Chester J. Straub, Circuit Judges.

OPINION:

SUMMARY ORDER

Plaintiff-appellant, Baltia Air Lines ("Baltia"), appeals from an order of the United States District Court for the Southern District of New York (Hellerstein, J.), entered on June 14, 2000, granting defendants-appellees', CIBC Oppenheimer Corp. ("Oppenheimer") and Canadian Imperial Bank of Commerce ("CIBC") (collectively, "defendants"), motion to dismiss the Amended Complaint pursuant to Fed. R. Civ. P. 9(b), 12(b)(1), and 12(b)(6) as well as Section 21D(b)(3)(A) of the Private Securities Litigation Reform Act of 1995 on the merits and on the ground of collateral estoppel. Defendants-appellees cross-

appeal the summary order entered on June 16, 2000 denying them an award of sanctions against plaintiff and its counsel pursuant to Fed. R. Civ. P. 11(b) and Section 21D(c) of the Securities Exchange Act of 1934 ("the Act"). See *15 U.S.C. § 78u-4*(c).

Baltia contracted with Hornblower & Weeks ("H&W") to underwrite its IPO on a firm-commitment basis. Oppenheimer, the firm that provided clearing services to H&W pursuant to an exclusive clearing agreement, exercised its contractual right and refused to serve as the clearing agency for Baltia's IPO.

Baltia sought an injunction in state court, which was denied, and the state court's decision on the merits was affirmed by the Appellate Division of the Supreme Court of New York. Permission to appeal to the Court of Appeals was denied. Baltia brought this action in federal court.

The district court dismissed Baltia's claimed violation of § 10(b) of the Act and Rule 10b-5 thereunder for lack of standing. That holding is affirmed. See *Chemical Bank v. Arthur Andersen & Co., 726 F.2d 930, 943 (2d Cir. 1984).*

[*3] We also affirm the district court's additional grounds for dismissal: (1) Oppenheimer did not have a duty to disclose, see *In re Blech Sec. Litig., 928 F. Supp. 1279, 1296 (S.D.N.Y. 1996)* (citing *Basic Inc. v. Levinson, 485 U.S. 224, 239 n.17, 99 L. Ed. 2d 194, 108 S. Ct. 978 (1988));* and (2) Baltia was collaterally estopped from asserting fraud (and its state law claims). See *Transaero, Inc. v. La Fuerza Aerea Boliviana, 162 F.3d 724, 731 (2d Cir. 1998).*

Further, we affirm the district court's dismissal of Baltia's section 17A(b)(6) claim. Section 17A(b)(6) does not provide a private right of action. See *Cort v. Ash, 422 U.S. 66, 45 L. Ed. 2d 26, 95 S. Ct. 2080 (1975).*

The district court's dismissal of Baltia's remaining federal claims was proper. Baltia failed to allege predicate acts to support a RICO claim, see *18 U.S.C. § 1962*(b) and (d), and the sale required to support a claim based on § 18(a) of the Act was non-existent in this case.

The district court did not commit reversible error. It was not permitted to consider Baltia's Submission, see *Harsco Corp. v. Segui, 91 F.3d 337, 341 n.1 (2d Cir. 1996)*

[*4] (court may review documents cited to and described in the complaint, even if they were not appended to the complaint). Moreover, Baltia's contentions that the district court did not read its brief and improperly interrupted its counsel during oral argument are unsupported by the record.

We do, however, vacate the district court's decision not to impose sanctions and remand this case for findings regarding the imposition or denial of sanctions pursuant to Section 21D(c)(1) of the Act. See *Gurary v. Winehouse, 190 F.3d 37, 47 (2d Cir. 1999)* ("As the statute required the district court to make findings, we have no choice but to remand in order to permit it to do so.").

For the reasons set forth above, the judgment of the district court is AFFIRMED, in part, and VACATED and REMANDED, in part, for proceedings consistent with this summary order.

BEFORE THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Baltia Airlines,

Plaintiff,

CIBC Oppenheimer,

Defendant

FINDINGS OF FACT AND CONCLUSIONS OF LAW FROM THE RECORD

Before: HON. ALVIN K. HELLERSTEIN,
District Judge

Ms. Lewis, I hold that you have no standing to sue or complain against Oppenheimer under the clearing agreement. The clearing agreement is between Hornblower and Oppenheimer and you may not invoke it.

I hold along with the appellate division on the merits and because of collateral estoppel that there was no fraud of your client under the public disclosure statement.

I hold that you have no right to invoke the clearing agency as a basis for suit.

I hold that you have no basis to complain for a violation of the National Clearing System.

The appellate division has spoken on the issue of contract, whether unilateral or promissory estoppel or anything else. You are not a party to the contract.

You are [not] entitled to have the third-party beneficiary status under the contract.

I hold you have not stated a claim for interference with contract. The contract is a normal clearing contract between Hornblower and Oppenheimer and is a right on the part of the clearing agent to decide for itself whether or not it will want to become a clearing agent for the customer. They can take a customer for itself.

I am now up to page 31 of your complaint.

There is no right under a client's part to be a third-party beneficiary. The appellate division so holds both on collateral estoppel and on the merits. I hold that you have no standing to be a third-party beneficiary.

I have already ruled - - I am now up to page 70 of the complaint - - that you have not appropriately alleged a fraud in connection with the securities transaction and therefore you cannot invoke Section 10(b) of the Exchange Act or Rule 10(b)(5) or 18(a) thereunder.

Furthermore, I do not believe that you have properly alleged a predicate acts or other constituent parts of RICO.

I have gone through your complaint. I find the complaint lacks merit.

I grant the motion to dismiss.

These are the conclusions. It will be issued this afternoon or Monday.

Mr. Schaffer's motion for sanctions is denied.

Thank you all.

(Proceeding adjourned)

BEFORE THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Baltia Airlines,

SUMMARY ORDER

Plaintiff,

00 CIB. 678 (AKH)

CIBC Oppenheimer,

Defendant

Before: HON. ALVIN K. HELLERSTEIN, U.S.D.J.:

The parties appeared for oral argument on defendants' motion to dismiss the Amended Complaint pursuant to Rules 9(b), 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure as well as Section 21D(b)(3)(A) of the Private Securities Litigation Reform Act of 1995. For the reasons stated on the record during argument, this case is dismissed on merits and on the grounds of collateral estoppel. The Clerk of the Court shall mark this matter closed.

SO ORDERED.

Dated: New York, New York
June 14, 2000

ALVIN K. HELLERSTEIN
United States District Judge

Appearances

STEFFANIE LEWIS
STEVEN ORLIKOFF
Attorneys for Plaintiff
FREDERICK P. SCHAFFER
MARTIN ZERWITZ

In the Matter of Baltia Air Lines, Inc., Appellant, v. CIBC Oppenheimer Corp., et al., Respondents.

Mo. No. 1148

COURT OF APPEALS OF NEW YORK

95 N.Y.2d 767; 742 N.E.2d 123; 2000 N.Y. LEXIS 3530; 719 N.Y.S.2d 647

November 21, 2000, Decided

NOTICE: DECISION WITHOUT PUBLISHED OPINION

OPINION: Motion for leave to appeal denied with one hundred dollars costs and necessary reproduction disbursements.

2000 N.Y. App. Div. LEXIS 8778,
In the Matter of Baltia Air Lines, Inc. v. CIBC Oppenheimer Corp.

M-4207

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

2000 N.Y. App. Div. LEXIS 8778

August 10, 2000, Filed, Entered
NOTICE: DECISION WITHOUT PUBLISHED OPINION

JUDGES: Tom, J.P., Wallach, Rubin, Saxe, Buckley, JJ.

OPINION: Reargument or other relief denied.

In the Matter of Baltia Air Lines, Inc., Appellant, v. CIBC Oppenheimer Corp. et al., Respondents.

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SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

273 A.D.2d 55; 709 N.Y.S.2d 54; 2000 N.Y. App. Div. LEXIS 6372

June 8, 2000, Decided
June 8, 2000, Entered

COUNSEL: For Plaintiff-Appellant: Steffanie Lewis.

For Defendants-Respondents: Frederick P. Schaffer.

JUDGES: Concur--Tom, J. P., Wallach, Rubin, Saxe and Buckley, JJ.

OPINION: Order, Supreme Court, New York County (Ira Gammerman, J.), entered May 13, 1999, which denied plaintiff's motion pursuant to CPLR 3217 (b) for leave to voluntarily discontinue this action without prejudice, and granted defendants' cross motion to dismiss the complaint pursuant to CPLR 3211 (a) (7), unanimously affirmed, with costs.

This action arises from the disruption of the scheduled initial public offering of the securities of plaintiff, a start-up airline, which resulted from the refusal by defendant CIBC Oppenheimer Corp. (Oppenheimer), the exclusive

clearing agent for plaintiff's underwriter (Hornblower), to clear transactions for the offering. To the extent the complaint is based on the contention that Oppenheimer's refusal to clear transactions in securities issued by plaintiff constituted a breach of the clearing agreement between Oppenheimer and Hornblower, plaintiff has no standing to sue for such alleged breach as a third-party beneficiary of the clearing agreement, the express terms of which negate any implication of third-party beneficiary rights (*see, Bordereaux v Salomon Smith Barney Holdings*, 269 AD2d 217, 218, citing *Fitzpatrick Constr. Corp. v County of Suffolk*, 138 AD2d 446, 449-450, *lv denied in part and dismissed in part* 73 NY2d 807). In any event, Oppenheimer's refusal to clear transactions in securities issued by plaintiff was authorized by the clearing agreement, which expressly entitled Oppenheimer to refuse to execute particular transactions and to prohibit Hornblower from underwriting particular securities. Hornblower's disclosure to plaintiff of its clearing relationship with Oppenheimer, as required by the clearing agreement, did not give rise to a contract or promissory estoppel between plaintiff and Oppenheimer, since the disclosure, which is alleged to have been substantially in the form of an attachment to the clearing agreement, did not include any clear and unambiguous promise by Oppenheimer to clear any particular transaction or group of transactions, and did not spell out any specific performance by a prospective customer that would create a contract between that customer and Oppenheimer. The omission of the disclosure of the clearing relationship to state that Oppenheimer had the right to refuse to clear any particular transaction was not

fraudulent, since nothing in the alleged disclosure was expressly or implicitly inconsistent with Oppenheimer having such a right, and no facts are alleged that could have given rise to a duty obligating Oppenheimer to disclose to plaintiff that it had such a right under the clearing agreement.

We reject plaintiff's remaining arguments concerning the legal sufficiency of the complaint. We note that plaintiff has failed to identify any breach by Hornblower of its underwriting agreement with plaintiff that could support a cause of action against Oppenheimer for tortious interference with contract (*see, e.g., Snyder v Sony Music Entertainment*, 252 AD2d 294, 299). With regard to plaintiff's arguments concerning the Securities Exchange Act of 1934, as amended (15 USC §§ 78a [the Exchange Act]), any claim for violation of the Exchange Act is subject to the exclusive jurisdiction of the Federal courts (see, 15 USC §§ 78aa), and plaintiff's argument that the provision of the clearing agreement barring enforcement by third parties is void as contrary to the Exchange Act is unsupported by citation of any provision of the Act or regulations promulgated thereunder inconsistent with such contractual provision. Finally, plaintiff's motion to discontinue the action without prejudice was correctly denied, since such relief was plainly sought in order to avoid an adverse decision on the merits (*see*, NBN Broadcasting v Sheridan Broadcasting Networks, 240 AD2d 319).

Concur—Tom, J. P., Wallach, Rubin, Saxe and Buckley, JJ.

Baltia Air Lines, Inc., Plaintiff-Appellant-Cross-Appellee, v. CIBC Oppenheimer Corp., and Canadian Imperial Bank of Commerce, Defendants-Appellees-Cross-Appellants.

Nos. 00-7867, 00-7883 (XAP)

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

6/1/01

ORDER

Petition for rehearing denied.